

**United States Department of Labor
Employees' Compensation Appeals Board**

_____)	
T.L., Appellant)	
)	
and)	Docket No. 19-1110
)	Issued: August 11, 2020
DEPARTMENT OF THE ARMY, U.S. ARMY)	
CORPS OF ENGINEERS, Vicksburg, MS,)	
Employer)	
_____)	

Appearances: *Case Submitted on the Record*
Joe M. Rogers, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Deputy Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On April 16, 2019 appellant, through counsel, filed a timely appeal from an October 18, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).² As more than 180 days elapsed from OWCP's last merit decision, dated November 27, 2015, to the filing

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from OWCP's October 18, 2018 decision was April 16, 2019. Since using April 17, 2019, the date the appeal was received by the Clerk of the Appellate Boards would result in the loss of appeal rights, the date of the postmark is considered the date of filing. As the envelope containing a postmark is not found in the record on appeal, the date of the letter is considered the date of filing. *See* 20 C.F.R. § 501.3(f)(1).

of this appeal, pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of his claim, finding that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On February 25, 2015 appellant, then a 44-year-old revetment worker, filed a traumatic injury claim (Form CA-1) alleging that he sustained a right knee injury on July 24, 2014 while in the performance of duty. In the section of the form for reporting "cause of injury," he advised that he was working a four-person job which was understaffed. Appellant did not stop work around the time he filed his claim.

In a February 23, 2015 memorandum, an employing establishment official indicated that appellant notified the employing establishment on February 3, 2015 of an apparent injury that occurred on or about July 24, 2014 when appellant fell and injured his right knee while working in the mat sinking unit. He advised that there was no documentation in the medical logs for July 2014 demonstrating that appellant was treated by the medical department for his apparent injury. There was, however, a notation in the log for September 8, 2014 indicating that appellant's right knee was treated with a bandage, but the log did not indicate that his condition was work related. The employing establishment official reported that appellant's employment was terminated on November 22, 2014 due to having been absent without leave and failing to follow proper leave procedures.

In a March 6, 2015 development letter, OWCP requested that appellant submit additional evidence in support of his traumatic injury claim, including a physician's opinion supported by a medical explanation as to how the reported July 24, 2014 employment incident caused or aggravated a medical condition. It provided a questionnaire for his completion which posed a series of questions regarding the reported employment incident. OWCP afforded appellant 30 days to respond. No response was received.

By decision dated April 15, 2015, OWCP found that appellant failed to submit sufficient evidence to establish that the claimed July 24, 2014 employment incident occurred at the time, place, and in the manner alleged. Thus, it determined that his traumatic injury claim was denied because he failed to establish the factual component of fact of injury.

On June 1, 2015 appellant requested reconsideration of the April 15, 2015 decision. In an accompanying written statement, he reported that he sustained a right knee injury at work on July 24, 2014 when he fell "off the stack." Appellant discussed the medical treatment he received

³ 5 U.S.C. § 8101 *et seq.*

for his right knee condition and indicated that he later stopped work after the pain and swelling in his right knee worsened.

Appellant submitted a March 18, 2015 magnetic resonance imaging (MRI) scan of his right knee which demonstrated degenerative changes of the medial meniscus with a possible radial tear. In an April 15, 2015 report, Dr. Michael Hood, a Board-certified orthopedic surgeon, indicated that he saw appellant on that date for right knee pain. He diagnosed quadriceps tendinitis and possible medial meniscus tear of the right knee, and he discussed the possibility of appellant undergoing a partial medial meniscectomy.

On July 14, 2015 appellant contacted OWCP by telephone and advised that he underwent right knee surgery three weeks prior.

By decision dated November 27, 2015, OWCP modified its April 15, 2015 decision to reflect that appellant had established that the July 24, 2014 employment incident, in the form of falling off a stack, occurred in the performance of duty as alleged. However, it denied his claim for a July 24, 2014 traumatic injury because he failed to submit sufficient medical evidence to establish a diagnosed medical condition causally related to the accepted employment incident.

On November 22, 2016 OWCP received a November 22, 2016 letter from counsel which requested reconsideration and attached a signed sworn statement from appellant. In the statement, appellant provided additional details explaining why he was requesting reconsideration and more specifically set forth his allegations regarding the July 24, 2014 employment incident.⁴

Appellant submitted an April 15, 2015 report from Dr. Hood who noted that appellant reported that he slipped on a slab and fell on an unspecified date, thereby sustaining a right knee injury. He complained of pain and popping in his right knee and reported that he could not work because workers' compensation would not pay for his injury. Dr. Hood reported examination findings and diagnosed quadriceps tendinitis and possible medial meniscus tear of the right knee. On June 12, 2015 he noted that he planned to proceed with right knee surgery.⁵

In a July 9, 2015 report, Dr. Hood advised that the incisions from appellant's right knee surgery were well healed.

In a February 4, 2016 report, Dr. Hood indicated that appellant had returned to his office complaining of a recurrence of right knee pain. Appellant reported that the pain was present with bending, squatting, and climbing, but he denied any injury. Dr. Hood noted that he was status post June 2015 right knee arthroscopy with chondroplasty. He detailed physical examination findings, noted mild-to-moderate degenerative changes of the right knee confirmed by x-ray, and

⁴ In a November 23, 2016 letter, OWCP informed appellant that it had received the November 22, 2016 request for reconsideration, however, it had not yet received authorization from appellant indicating that counsel was his authorized representative. Therefore, it informed him that it could not process this request without the submission of an attorney authorization and another written request for a reconsideration. In a December 23, 2016 letter, received by OWCP on January 9, 2017, appellant authorized counsel to represent him before OWCP.

⁵ Appellant submitted Dr. Hood's June 26, 2015 report of right knee arthroscopic chondroplasty performed on that date.

recommended that total right knee arthroplasty be postponed for as long as possible. On May 24, 2016 Dr. Hood noted that appellant returned to his office complaining of right knee pain. He diagnosed right knee patellofemoral joint arthritis, medial compartment chondromalacia, and status post chondroplasty.⁶

In narrative reports dated from December 2, 2015 through May 9, 2016, Dr. David Webber, an osteopath Board-certified in family medicine, noted that appellant continued to complain of right knee pain and anxiety. He diagnosed degenerative joint disease of the right knee and anxiety disorder, and he treated appellant with pain and anxiety medication. In handwritten progress notes from October 20, 2014 through October 12, 2016, nurses and other health care providers from Dr. Webber's office, whose signatures were illegible, detailed findings on physical examination.⁷ Appellant also submitted administrative documents from the office of Dr. Webber, including forms dated October 12, 2014 and March 13, 2015 which listed upcoming diagnostic tests.

On September 13, 2018 appellant, through counsel, again requested reconsideration of OWCP's November 27, 2015 decision. Counsel advised that he had previously submitted a reconsideration request on November 22, 2016 with attached documentation, but had not received a notice of action on that request. He attached a copy of a January 16, 2015 decision from the Mississippi Department of Employment Security which found that appellant had voluntarily left his position with the employing establishment because he had not received reimbursement for medical expenses related to his claimed July 24, 2014 work injury.

By decision dated October 18, 2018, OWCP denied appellant's request for reconsideration finding that it was untimely filed and failed to demonstrate clear evidence of error. It determined that his request for reconsideration was not filed until September 13, 2018. OWCP found that appellant had not submitted evidence demonstrating clear evidence of error in the last merit decision dated November 27, 2015.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.⁸ This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁹ Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal

⁶ Appellant submitted administrative documents from Dr. Hood's office. He also submitted copies of the March 18, 2015 MRI scan of his right knee and the April 15, 2015 report of Dr. Hood previously submitted to OWCP.

⁷ In records dated June 20, 2008, a nurse from Dr. Webber's office, whose signature was illegible, reported physical examination and drug testing results.

⁸ 5 U.S.C. § 8128(a); *see also* *A.B.*, Docket No. 19-1539 (issued January 27, 2020); *W.C.*, 59 ECAB 372 (2008).

⁹ 20 C.F.R. § 10.607(a).

Employees' Compensation System (iFECS).¹⁰ Imposition of this one-year filing limitation does not constitute an abuse of discretion.¹¹

ANALYSIS

The Board finds that OWCP improperly determined that appellant's request for reconsideration was not timely filed within the one-year time period.¹²

The record contains a letter dated and received on November 22, 2016, from counsel, which requested reconsideration of OWCP's November 25, 2015 decision and included the attachment of a signed sworn statement from appellant. In his statement, appellant provided additional details explaining why he was requesting reconsideration of the denial of his claim and more specifically set forth his allegations regarding the July 24, 2014 employment incident. The November 22, 2016 letter contained OWCP's claim number, indicated that the letter was a request for reconsideration of the November 25, 2015 decision, and contained the signed statement from appellant. Also submitted was medical evidence, including reports from Drs. Hood and Webber for treatment which occurred after the November 25, 2015 decision and a statement that additional medical evidence on the issue of causal relationship would be submitted. Accordingly, the Board finds that the November 22, 2016 letter and accompanying signed statement of appellant, received by OWCP on November 22, 2016, constituted a request for reconsideration.¹³ Therefore, because appellant's November 22, 2016 request for reconsideration was received within one year of OWCP's November 22, 2017 merit decision,¹⁴ it was timely filed.¹⁵

As it erroneously reviewed the evidence submitted in support of appellant's reconsideration request under the more stringent clear evidence of error standard which applies to untimely filed reconsideration requests, the Board will remand the case for review of this evidence and argument under the proper standard of review for a timely reconsideration request.¹⁶ Thus, the Board finds that the case must be remanded for proper adjudication and application of the appropriate standard of review, to be followed by an appropriate decision.

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

¹¹ *G.G.*, Docket No. 18-1072 (issued January 7, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹² *E.S.*, Docket No. 17-0698 (issued July 14, 2017).

¹³ *See supra* note 10 at Chapter 2.1600.3(b) (June 1997); *see also R.D.*, Docket No. 14-896 (issued August 1, 2014); *C.M.*, Docket No. 11-1988 (issued June 6, 2012).

¹⁴ Section 10.607(a) of the Board's *Rules of Procedure* provides that an application for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought. 20 C.F.R. § 10.607(a).

¹⁵ *J.H.*, Docket No. 18-1367 (issued July 17, 2019); *R.M.*, Docket No. 17-0473 (issued June 6, 2017); *C.B.*, Docket No. 13-1732 (issued January 28, 2014).

¹⁶ *L.N.*, *Order Remanding Case*, Docket No. 19-0170 (issued August 21, 2019).

CONCLUSION

The Board finds that OWCP improperly determined that appellant's request for reconsideration was not timely filed within the one-year time period.

ORDER

IT IS HEREBY ORDERED THAT the October 18, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 11, 2020
Washington, DC

Christopher J. Godfrey, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board